

Chuck

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE)	
APPLICATION 76M-103849 BY)	FINAL
HARTMUT W. AND INGA M.)	ORDER
BAITIS)	

* * * * *

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received. Therefore, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the May 22, 2000, Proposal for Decision, and incorporates them herein by reference.

WHEREFORE, based upon the record herein, the Department makes the following:

ORDER

Subject to the terms, conditions, restrictions, and limitations listed below, Beneficial Water Use Permit 76M-103849 is issued to Hartmut W. and Inga M. Baitis to appropriate up to 37.32 acre-feet of water per year from an unnamed tributary of Josephine Creek at a point in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 9, Township 16 North, Range 23 West, Missoula County, Montana. The permitted means of diversion is a pit/dam. The permitted period of appropriation is from January 1 to December 31, inclusive of each year. The permitted use is a fishery. The permitted place of use is an instream reservoir with a capacity of 9.33 acre-feet located in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ and the NW $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of said Section 9.

A. This right is subject to the permanent installation of an adequate drainage device to satisfy existing water rights.

CASE #

B. This right is subject to the condition that the project shall be designed by and constructed under the supervision of a professional engineer registered in the state of Montana who is experienced in the design of dams.

C. The permittee must acquire a private fish pond license as required by Mont. Code Ann. §87-4-603. The permittee must stock the pond with fish quantities allowed in the private fish pond license, within two years of completion of pond construction. Copies of the license and stocking purchase invoices are required to show project completion.

D. The issuance of this right by the Department shall not reduce the appropriator's liability for damages caused by the appropriator's exercise of this right. Nor does the Department in issuing the right in any way acknowledge liability for damage caused by the appropriator's exercise of this right.

E. If at any time after this right is issued, a written complaint is received by the department alleging that diverting from this source is adversely affecting a prior water right, the Department may make a field investigation of the project. If during the field investigation the department finds sufficient evidence supporting the allegation, it may conduct a hearing in the matter allowing the appropriator to show cause why the right should not be modified or revoked. The Department may then modify or revoke this right to protect existing rights or leave this right unchanged if the hearing officer determines no existing water rights are being adversely affected.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of this Final Order.

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcription prepared as part of the record of the administrative hearing for

Final Order

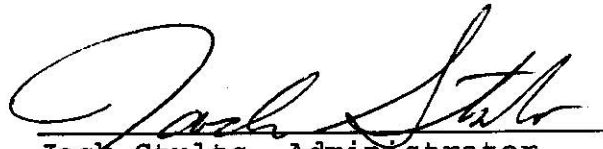
Page 2

Application 76M-103849 by Hartmut W and Inga M Baitis

CASE

certification to the reviewing district court, the requesting party must make arrangements with the Department of Natural Resources and Conservation for ordering and payment of the written transcript. If no request is made, the Department will transmit a copy of the tape of the proceedings to the district court.

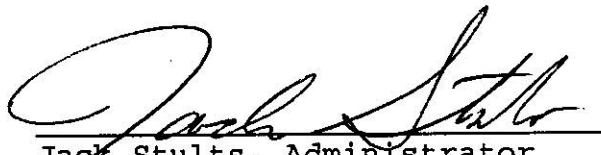
Dated this 12th day of July, 2000.



Jack Stults, Administrator
Water Resources Division
Department of Natural
Resources and Conservation
PO Box 201601
Helena, MT 59620-1601

certification to the reviewing district court, the requesting party must make arrangements with the Department of Natural Resources and Conservation for ordering and payment of the written transcript. If no request is made, the Department will transmit a copy of the tape of the proceedings to the district court.

Dated this 12th day of July, 2000.



Jack Stults, Administrator
Water Resources Division
Department of Natural
Resources and Conservation
PO Box 201601
Helena, MT 59620-1601

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was served on all parties listed below on this 14th day of July, 2000, as follows:

HARTMUT W AND INGA M BAITIS
2705 LORRAINE DRIVE
MISSOULA MT 59803

DAVID L PENGELLY
ATTORNEY AT LAW
PO BOX 8106
MISSOULA MT 59807

ELIZABETH F THISTED
28850 MINE MILE ROAD
HUSON MT 59846

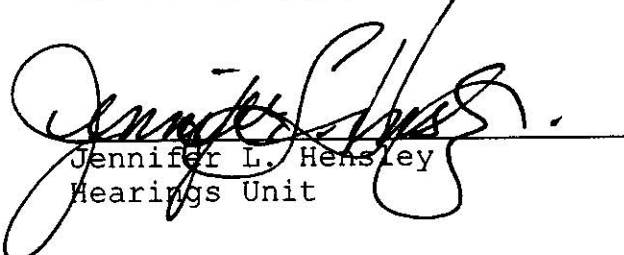
PAUL QUALLEY
ROSALIE MACDOWELL QUALLEY
28 CEDARCLIFF ROAD
ASHEVILLE NC 28803

GRANT PARKER
2291 W BROADWAY
MISSOULA MT 59801

JAMES E GOUAUX
606 WEST CRESTLINE
MISSOULA MT 59803

CURT MARTIN, MANAGER
WES MCALPIN, WRS
MISSOULA WATER RESOURCES
REGIONAL OFFICE
1610 S THIRD ST W STE 103
MISSOULA MT 59804-5114

CHIEF, WATER RIGHTS BUREAU
DEPARTMENT OF NATURAL
RESOURCES & CONSERVATION
PO BOX 201601
HELENA MT 59620-1601


Jennifer L. Hensley
Hearings Unit

Chuck

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE)	
APPLICATION FOR BENEFICIAL)	PROPOSAL
WATER USE PERMIT 76M-103849 BY)	FOR
HARTMUT W. AND INGA M. BAITIS)	DECISION

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, and after notice required by Mont. Code Ann. §85-2-307 (1999), a hearing was held on November 17, 1999, in Missoula, Montana, to determine whether a beneficial water use permit should be issued to Hartmut W. and Inga M. Baitis (Applicants) for the above application under the criteria set forth in Mont. Code Ann. §85-2-311 (1999).

APPEARANCES

Applicants appeared at the hearing in person and by and through counsel, David L. Pengelly.

Objector Elizabeth G. Thisted appeared at the hearing in person and by and through counsel, Grant Parker. Mr. Parker also represented Paul and Rosalie Qualley who did not appear at the hearing. Ralph Thisted appeared as a witness for Mrs. Thisted. E. Karl Uhlig, Water Rights Specialist, and Daniel E. March, Hydraulic/Environmental Engineer, both with Land & Water Consulting, Inc., appeared at the hearing as witnesses for Objector Thisted.

CASE # 103849

Wes McAlpin, Water Resources Specialist with the Missoula Water Resources Regional Office of the Department of Natural Resources and Conservation (Department) was called to testify by the Applicant and Objectors.

EXHIBITS

Both Applicants and Objectors offered exhibits for the record.

Applicants offered four exhibits for the record. The Hearing Examiner accepted Applicants' Exhibits 1 and 2. The Hearing Examiner declined to accept exhibits 3 and 4 which duplicated information in the Department file.

Applicants' Exhibit 1 consists of a map approximately 15 inches by 24 inches and 16 enlarged photographs. The map is composed of enlarged segments of topographic maps. The dashed line outlines the Josephine Creek drainage. The heavy black line outlines the unnamed tributary drainage which is the source of water for Applicants' proposed pond, shown in blue. The enlarged photographs are numbered in the lower left side to correspond with the numbers on the map. Each photograph is dated and has the Applicants' measured or estimated flow rate in the stream at that point on that date. The photographs were taken by Hartmut Baitis.

Applicants' Exhibit 2 consists of a plan map, three panoramic photographs of the proposed pond site, and a diagrammatic drawing of a dam structure. The photographs have numbers in red circles to correspond with numbers on the plan map. The photographs were taken by Hartmut Baitis.

Objector offered 13 exhibits for the record. The Hearing Examiner accepts Exhibits F, G, and H. Exhibits A, B, C, D, E, I were duplicates of information in the Department file. Exhibits K, L, and M were offered to support the water quality objection

and were declined by the Hearing Examiner at the hearing. See Preliminary Matters below.

Objector Thisted's Exhibit F consists of two identical well logs for a well drilled to a depth of 40 feet. The well was abandoned as a dry hole.

Objector Thisted's Exhibit G consists of two identical well logs for a well drilled to a depth of 120 feet. The well was abandoned as a dry hole.

Objector Thisted's Exhibit H consists of two identical well logs for a well drilled to a depth of 35 feet. The well was abandoned as a dry hole.

Objector Thisted's Exhibit J is a Draft Environmental Impact Statement (EIS) completed September 1999 by the United States Forest Service, Lolo National Forest. This exhibit was offered to show the Department did not perform an accurate environmental assessment for this proposed project. Applicant objected to the relevancy of this exhibit. Objector's Exhibit J is not relevant to the criteria for issuance of a water use permit and therefore will not be considered in this decision.

PRELIMINARY MATTERS

At the beginning of the hearing, Objectors moved to amend their original water quality objection. In a Clarification of Objection issued prior to the hearing, the hearings examiner had rejected the water quality objection because the objection was not supported by substantial credible information. Since the objection was previously rejected, the motion to amend must be treated as a new objection. To bring such a motion on the morning of the hearing is untimely and denies Applicants the ability to prepare for the objection. Water quality is not an issue properly raised for consideration in this decision.

Several times during the hearing, Objector attempted to enter evidence in the record that the Department's processing procedures were inadequate, specifically, the environment assessment. As previously stated, the purpose of this hearing was to determine if Applicants had met the statutory criteria for issuance of a permit, not to challenge the Department's processing procedures.

The Hearing Examiner who conducted the hearing is unavailable to the Department. The substituted Hearing Examiner did attend the hearing in its entirety.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following:

FINDINGS OF FACT

1. Application for Beneficial Water Use Permit 76M-103849 in the name of and signed by Hartmut W. and Inga M. Baitis was filed with the Department on June 8, 1998.
2. Applicants seek to appropriate up to 37.32 acre-feet of water per year from an unnamed tributary of Josephine Creek at a point in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 9, Township 16 North, Range 23 West, Missoula County, Montana. The proposed means of diversion is a pit/dam. The proposed period of appropriation is from January 1 to December 31, inclusive of each year. The proposed use is fish and wildlife. The proposed place of use is an instream reservoir with a capacity of 9.33 acre-feet located in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ and the NW $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of said Section 9. (Department file, testimony of Hartmut Baitis)
3. Applicants have proven the water is physically and legally available. Hartmut Baitis measured the flow of the unnamed tributary at approximately 100 gallons per minute on April 3, 1999, in three different places above the proposed pond site; at

CASE #103849

the culvert located in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 4, at a point above the spring site in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 9, and at the springs in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ in Section 9, all in Township 16 North, Range 23 West. At 100 gallons per minute the proposed reservoir would fill in approximately 21 days. On May 13, 1999, the unnamed tributary was measured at the same three sites. The flow at the upper culvert was 13.2 gallons per minute. Below the culvert and above the spring site there was no surface flow. At the spring site, the flow was estimated to be 15 gallons per minute. The flow of Josephine Creek was estimated to be 2000 gallons per minute by Objector's hydrologist and water rights experts on May 13, 1999. At 100 gallons per minute for three months and the year round flow of 15 gallons per minute from the springs, there is sufficient water, 57.6 acre-feet of surface water available annually from the unnamed tributary of Josephine Creek. If the high flow period lasts only six weeks (45 days), there still would be sufficient unappropriated flow, 40.77 acre-feet per year, for Applicants' project. It is expected there would be carryover water in the reservoir most years so the entire volume of 37.32 acre-feet would not be needed every year.

(Department file, testimony of Hartmut Baitis and E. Karl Uhlig)

4. Applicants have proven there would be no adverse effect to the water rights of prior appropriators under an existing water right, certificate, permit, or state water reservation. There are no surface water rights on the unnamed tributary of Josephine Creek below Applicants' proposed point of diversion. There are surface water rights on Josephine Creek, however, during high flow periods when Applicants would be filling their reservoir, there is no shortage of water. When the high flow periods are over, there is no surface flow immediately below the proposed pond in Applicants' source that contribute to the flow of Josephine Creek. If it is determined Applicants have impounded water that should have been allowed to flow downstream, the dam

would be equipped with a drainage device to release such water.
(Department file and records, testimony of Hartmut Baitis)

5. Applicants have proven the proposed means of diversion, construction, and operation of the appropriation works are adequate. The project would be designed by and constructed under the supervision of a professional engineer registered in the state of Montana who is experienced in the design of dams. Applicants or their representative would be available to release the water if necessary. (Department file, testimony of Hartmut Baitis)

6. Applicants have proven the proposed use of water for a private fish pond is beneficial. When Applicants stock the pond with fish purchased from a lawful source and when Applicants procure a private fish pond license as required by Mont. Code Ann. §87-4-603 (1999) there is a benefit to the appropriator for fishery purposes. The pond would benefit Applicants by providing recreation, either by fishing the pond or observing the fish in the pond. The amount of water requested is within the guidelines for a pond of this size. The amount would provide a complete turnover four times a year and is reasonable. (Testimony of Hartmut Baitis, E. Karl Uhlig, and Wes McAlpin, Department file, Memorandum [below])

7. Applicants have not proven the proposed use of water for a wildlife pond is beneficial. If there are wildlife and waterfowl in the area, they will most likely use the pond. The applicant did not quantify the amount of water needed for the desired benefits from the use of water for wildlife purposes. (Testimony of Hartmut Baitis, E. Karl Uhlig, and Wes McAlpin, Department file, Memorandum [below])

8. Applicants have proven they have possessory interest in the property where the water is to be put to beneficial use. They own the property. (Department file, testimony of Hartmut Baitis)

Based on the foregoing Findings of Fact and the record in this matter, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Department has jurisdiction to issue a provisional permit for the beneficial use of water if the applicant proves the criteria in Mont. Code Ann. §85-2-311 (1999).
2. Applicant has met the criteria for issuance of a beneficial water use permit. See Findings of Fact 1 through 8 Mont. Code Ann. §85-2-311 (1999).

WHEREFORE, based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations listed below, Beneficial Water Use Permit 76M-103849 is issued to Hartmut W. and Inga M. Baitis to appropriate up to 37.32 acre-feet of water per year from an unnamed tributary of Josephine Creek at a point in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 9, Township 16 North, Range 23 West, Missoula County, Montana. The permitted means of diversion is a pit/dam. The permitted period of appropriation is from January 1 to December 31, inclusive of each year. The permitted use is a fishery. The permitted place of use is an instream reservoir with a capacity of 9.33 acre-feet located in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ and the NW $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of said Section 9.

A. This right is subject to the permanent installation of an adequate drainage device to satisfy existing water rights.

B. This right is subject to the condition that the project shall be designed by and constructed under the supervision of a professional engineer registered in the state of Montana who is experienced in the design of dams.

C. The permittee must acquire a private fish pond license as required by Mont. Code Ann. §87-4-603. The permittee must stock the pond with fish quantities allowed in the private fish pond license, within two years of completion of pond construction. Copies of the license and stocking purchase invoices are required to show project completion.

D. The issuance of this right by the Department shall not reduce the appropriator's liability for damages caused by the appropriator's exercise of this right. Nor does the Department in issuing the right in any way acknowledge liability for damage caused by the appropriator's exercise of this right.

E. If at any time after this right is issued, a written complaint is received by the department alleging that diverting from this source is adversely affecting a prior water right, the Department may make a field investigation of the project. If during the field investigation the department finds sufficient evidence supporting the allegation, it may conduct a hearing in the matter allowing the appropriator to show cause why the right should not be modified or revoked. The Department may then modify or revoke this right to protect existing rights or leave this right unchanged if the hearing officer determines no existing water rights are being adversely affected.

MEMORANDUM

The Department has been issuing water use permits for pond uses since the inception of the Water Use Act. It seems that the Department has become the resource used by applicants to quantify how much water is required for a proposed fish, wildlife, or recreation pond. The Department has a policy to guide staff as to what is a reasonable flow rate (turnover or exchange rate) for ponds. Applicants often turn to the Department and its pond

CASE # 103849

policy for flow rate and volume justification to complete their water use permit application.

This use of the Department is similar, but not the same as, the approach to proposed irrigation. Often a landowner comes to the department with a desire to irrigate some land. The number of acres to be irrigated and crop are fed into a Natural Resources and Conservation "formula" which suggests a reasonable quantity of irrigation water for the particular climactic area and crop. How many acres will end up irrigated is not evaluated in the "formula". That is left to a water availability analysis, and the resources of the applicant.

The current approach to proposed ponds does not ask how much water the "crop" (fish or wildlife) requires. Instead the size (capacity) of a proposed pond forms the basis for the application rate and volume. Just as a potential irrigator must gather information to decide how much water, flow rate and volume, is needed for a proposed project, so must a potential pond owner. The amount of water needed to sustain the intended use(s) of a pond without wasting water requires quantification for each pond application and each pond use.

If a pond is desired by a landowner and a quantity of water cannot be determined as necessary to sustain the use, a water use permit cannot be granted. The Montana appropriation statutes refer to "an amount or quantity of water". See Mont. Codes Ann. §85-2-102 (1)(a), (1999), and §85-2-311 (1)(a)(i & ii), (1999). Elsewhere the statutes specifically state "The Department may issue a permit...but may not issue a permit for more water than is requested or than can be beneficially used without waste for the purpose stated in the application..." Mont. Codes Ann. §85-2-312 (1) (1999). Department contested case orders show a repeating pattern that before a permit for a beneficial use or purpose can be granted, the use must be quantified.. See *In The Matter of Application 41Q-033983 by Hoyt, Proposal for Decision*,

CASE # 103849

(1982); Application 76L-050510 by Meyer, Proposal for Decision, (1986); Application 41H-055362 by Kenney, Proposal for Decision, (1986); Application 41H-081855 by Martin and Ewing, Proposal for Decision, (1993).

There was testimony that the proposed fish pond use is within the Department's guidelines of reasonableness, and the applicant is willing to acquire a private fish pond license. There was no testimony of how many fish would be placed in the proposed pond that might quantify the amount of water needed. If water is to be set aside to sustain a beneficial use, it must be put to the use. That is, the pond must be stocked to the extent of the water right.

The wildlife use associated with this project is not wildlife brought in by the applicant; nor has a specific amount of water to create a wildlife habitat been identified. Instead an unknown number of area wildlife may use the pond. The applicant has not determined how much water is necessary to sustain the proposed wildlife use. Without such determination, a water right for this purpose cannot be granted. There may be private wildlife habitat licenses needed or available that could be used to indirectly quantify the proposed use; however, there was no testimony in that regard.

Thus, this permit is conditioned to require acquisition of a fish pond license, and stocking the pond to show the water will be put to the beneficial use as required in Mont. Codes Ann. §85-2-311(1)(d) (1999) under the authority granted in Mont. Codes Ann. §85-2-312(1) (1999).


NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below.

Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Parties may file responses to any exception filed by another party. The responses must be filed within 20 days after service of the exception and copies must be sent to all parties. No new evidence will be considered.

No final decision shall be made until after the expiration of the time period for filing exceptions, and due consideration of timely exceptions, responses, and briefs.

Dated this 22nd day of May, 2000.



Charles F Brasen
Hearing Officer
Water Resources Division
Department of Natural Resources
and Conservation
PO Box 201601
Helena, Montana 59620-1601

CERTIFICATE OF SERVICE

This certifies a true and correct copy of the Proposal for Decision was served upon all parties listed below this 24th day of May, 2000.

HARTMUT W AND INGA M BAITIS
2705 LORRAINE DRIVE
MISSOULA MT 59803

GRANT PARKER
2291 W BROADWAY
MISSOULA MT 59801

DAVID L PENGELLY
ATTORNEY AT LAW
PO BOX 8106
MISSOULA MT 59807

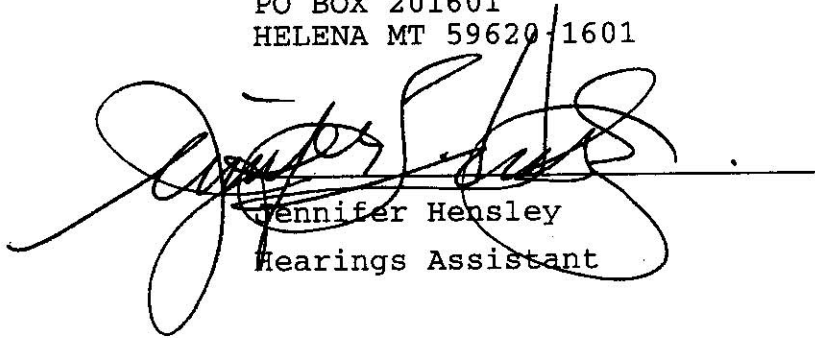
JAMES E GOUAUX
606 WEST CRESTLINE
MISSOULA MT 59803

ELIZABETH F THISTED
28850 MINE MILE ROAD
HUSON MT 59846

CURT MARTIN, MANAGER
WES MCALPIN, WRS
MISSOULA WATER RESOURCES
REGIONAL OFFICE
1610 S THIRD ST W STE 103
MISSOULA MT 59804-5114

PAUL QUALLEY
ROSALIE MACDOWELL QUALLEY
31255 NINE MILE ROAD
HUSON MT 59846

NANCY ANDERSEN, CHIEF
WATER RIGHTS BUREAU
DEPARTMENT OF NATURAL
RESOURCES & CONSERVATION
PO BOX 201601
HELENA MT 59620-1601



Jennifer Hensley
Hearings Assistant